No. 96-961

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TONNELLE AVENUE BOOKS & VIDEO, INC.,

Petitioner,

—v.—

TOWNSHIP OF NORTH BERGEN, NEW JERSEY, TOWNSHIP OF NORTH BERGEN BOARD OF COMMISSIONERS, NICHOLAS J. SACCO, FRANK GARGUILO, LEO GATTONI, JR., MICHAEL DI GIOVANNI, THOMAS LIGGIO, EDWARD F. RANNOU, Individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE STATE OF NEW JERSEY

PETITIONER'S REPLY BRIEF

VERDIRAMO & VERDIRAMO, ESQS.
Attorneys for Petitioner, of Counsel
3163 Kennedy Boulevard
Jersey City, New Jersey 07306
(201) 798-7082

SUMMERVILLE, RADDING & CAMPBELL, ESQS.
Attorneys for Petitioner, of Counsel
694 Bergen Avenue
Jersey City, New Jersey 07304
(201) 435-4891

RALPH J. SCHWARZ, JR., ESQ.
21 East 40th Street, 7th Floor
New York, New York 10016
(212) 532-0911

Counsel of Record and Admitted New Jersey Pro Hac Vice

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THE FACTS.

The respondents for almost three pages set forth "Correction of Mis-statements in the Petition" (Res. Br. p. 7, 8, 9). The heading should more appropriately read, "Respondents' False Attempt to Create Fact Disputes Despite the Trial Court's Finding No Factual Dispute Exists".

Respondents first assert the July 17, 1996 Appellate Division decision [due process] "* * * accurately reflect[s] the facts and issues in this case". (Res.Br. p. 7) That is not so. The Trial Court's First Amendment Equal Protection opinion (13a-16a) reflects many of the critical facts of respondents' illicit motive in enforcing the industrial zoning ordinance not mentioned or relied on by the Appellate Division. They include, for example, respondents' initial enforcement of the "old obscenity ordinance", not the zoning law, the initial grant by the Zoning Officer, Mr. Scala, of the Certificate of Continued Occupancy, the Mayor's August 28, 1991 Press Conference, the adult-use ordinances prohibiting any operation by petitioner, and stationing police cars with flashing lights in front of petitioner's store, "halted by Court order". (14a)

We now outline in column form some of the mis-statements of respondents, glaringly at odds with the Court findings and the record.

Respondents' Position	*Court Decision or Record*
Tr. Ct. "made no finding * * * a de facto commercial zone exists." (Res.Br. p. 7)	5/11//94 App. Div. states Tr.Ct. found the Zone was "a de facto commercial zone". (25a)

Respondents' Position	*Court Decision or Record*
No basis to find "large number of commercial uses" exist to support a de facto commercial zone. (Res. Br. p. 8)	Tr.Ct. findings: "*casual observer * * * not* consider *this an industrial zone*"; "*on paper*" only and not "*in* reality"; never "*treated*" as an industrial zone, *it was* a de facto commercial *zone*". (Ct.Hr. 8/4/92, T. 29, L. 8-9; (Res.Br. p. 8) T. 30, L. 8-13, Ct. Hr. 2/7/92, T. 55, L. 22-25; T. 56, L. 1-2, Da 177, 178; Ct. Hr.6/10/94, T. 9, L. 22, 23, T. 11, L. 23, 24, emph. sup.)
Adult use ordinances repealed & never affected Tonnelle use or operation. (Res. Br. p. 8)	Adult use ordinances never "affected" petitioner's use because enforcement was stayed. (Pet. Br.p. 5) However, ordinances were aimed at petitioner. (14a)
No proof only enforced zoning law against Tonnelle and juice bar. (Res. Br. p. 8, 9)	For 14 years respondents enforced Zoning Law *only* against Tonnelle and juice bar to prevent nudity. (Da 93; Ct.Hr. 2/7/92, T. 18, L.14-17, p. 20, L. 13-15; Pa 44, Da 153, 178)

Respondents' Position	*Court Decision or Record*
Petitioner falsely states Mr. Scala's testimony existing uses [not] contrary to Zoning Ordinance. (Res.Br.p.9)	" * * * proposed or existing use was [not] contrary to Zoning ordinance." (Da 170) quote is from Bd.Hr. testimony of Mr. Scala, 8/28/91, p. 59, L. 24-25.
Pet. atty. statement "without a supporting basis in the record is not a fact." (aptly observed by the App.Div.) [Res.Br. p.9]	Tr .Ct. no facts really in dispute. (13a) and see (Ct. Hr. 8/19/94, T. 4, L. 10-25; T. 5, L. 1-4; T.23, L.8-11; T.25, L. 10-14; T. 32, L. 18-20). (No "big factual disputes, [only] Characterizations, labels * * * disputed.") There is no such "apt" observation by the App.Div.

Pages 7 and 8 of respondents' Brief contain a long quotation from the May 11, 1994 variance decision holding that "the existence of other non-conforming uses is not a special reason" for granting a variance. This 1994 variance holding furnishes absolutely no basis for the Appellate Division's July 17, 1996 decision, totally ignoring or mis-stating all of plaintiff's First Amendment Equal Protection facts and the Appellate Division's subsequent July 14, 1994 holding. (19a, 20a)

POINT I

EVERY FIRST AMENDMENT CASE CITING YICK-WO INVOLVES AN APPLICATION OF STRICT SCRUTINY AND FIRST AMENDMENT LAW AND NOT DUE PROCESS.

Reply to Respondents' Points I thru IV.

According to respondents, there is "a facially valid constitutional ordinance" correctly applied; therefore, there is no conflict. (Res.Br., p. 10) Respondents then assert there is no *Yick-Wo v. Hopkins*, 118 U.S. 356, 373, 374 (1886) Equal Protection claim because:

> "There is no classification established in the North Bergen Zoning Ordinance that regulates, prohibits or implicates any activity afforded First Amendment protection. * * * This facially valid constitutional zoning ordinance can be enforced irrespective of any First Amendment claim raised by Tonnelle. Tonnelle did not and can not cite a case to this Court that would permit [its] operation * * *". (Res. Br., p. 11)

To the contrary, every First Amendment case cited by petitioner, relying on *Yick-Wo*, established that respondents may *not* apply a facially-valid neutral zoning ordinance with an evil eye and an unequal hand in order to destroy petitioner's First Amendment rights. *Holder v. City of Allentown*, 987 F.2d 188, 197-199 (CA 3, 1993); *Show-World Center, Inc. v. Walsh*, 438 F.Supp. 642, 651-652 (SDNY 1977) (relying on and citing *Yick Wo v. Hopkins*, 118 U.S. 356); *303 West 42nd Street v. Klein*, 46 NY2d 686, 693-698, 416 NYS2d 219, 223-236 (1979); *LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587, 589, 590 (CA 2 1994). *United States v. Steele*, 461 F.2d 1148, 1150-1152 (CA 9, 1972); *United States v. Falk*, 479 F2d 616 (CA 7, 1973, en banc)

Respondents make *no comment on any* of these cases, all of which are directly applicable. Respondents do not favor this Court with any comment on *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) which is also directly in point. In *Bantam Books,* a Rhode Island statute was, on its face, content-neutral, and it did not regulate or suppress obscenity. (372 U.S. at 66) However, the Supreme Court looked through the form to the substance and held that informal censorship, which is certainly what is involved here, was sufficient to warrant injunctive relief to halt the interference with First Amendment rights.

In addition, the petition pointed out that the July 17, 1996 Appellate Division decision relied on *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 484 (1974) to evaluate all of the evidence on a due-process basis, and that this was in direct conflict with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. ___, 132 L.2d Ed. 487, 499, 500, 115 S.Ct. 2338, 2344 (1995), which mandates that evidence in a First Amendment case, including of course a First Amendment Equal Protection as applied case, employ a strict scrutiny standard. (Pet.Br., p. 13) Respondents do *not* mention or cite these cases. Respondents then assert:

> "Tonnelle consistently makes the same argument that (1) we applied for a variance and were denied and (2) this is a *de facto* commercial zone. The record does not support these arguments." (Res.Br., p. 12)

Respondents, by subdivision(1) of their first sentence quoted above, attempt to twist petitioner's 1991 variance application, and the 1994 due-process variance Appellate Division decision into petitioner's First Amendment Equal Protection as applied case. Petitioner's constitutional claim does *not* involve denial of a variance. We repeat for the umpteenth time that petitioner claims an inter-related First Amendment Equal Protection violation stemming from the

fact that petitioner, exercising First Amendment rights, and a juice bar, because of nudity, were the only retail entities ever prosecuted for being commercial entitities in the industrial zone and only to stop their adult activity in the Township. *Holder v. City of Allentown*, supra. (987 F.2d at 197-199, et al.)

The July 17, 1996 Appellate Division decision, as a matter of law, also erroneously treats petitioner's First Amendment Equal Protection as-applied claim as if it was a variance application case. (7a) As we pointed out in our petition, page 12, a retail store which sells shoes could apply for and be denied a variance because it did not fill out the right form or had inadequate parking, which has nothing to do with being prosecuted or treated selectively because of any constitutional claim, much less the First Amendment.[1]

Respondents also forget that at the February 7, 1992 hearing, respondents' counsel admitted the prior 1980 M-1 industrial zone is "*almost exact*" to the present 1987 industrial zone. (2/7/92 Hr. T.28, L.13-17) The foregoing emphasizes that the Trial Court's finding that the zone was a "de facto commercial zone" spanned ten to fourteen years.

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[1] Assuming that applying for and being denied a variance is relevant, there was evidence undisputed in the record that the petitioner was, in fact, the only retail store which *in ten (10) years* up through 1991 had applied for, but was denied a variance. Petitioner's motion to the New Jersey Supreme Court to supplement the record by adding this material was granted. (18a)

POINT II

THE ZONE IS IN REALITY A DE FACTO COMMERCIAL ZONE AS THE TRIAL COURT FOUND.

Reply to Respondents' Point V.

The petition pointed out that the Appellate Division, citing *Rova Farms*, supra, 65 NJ at 484, had without basis asserted that the earlier May 11, 1994 Appellate Division variance decision had stated that the Zoning Board expert testified that the zone was 95% industrial.

Respondents candidly admit "these statements are in error". According to the respondents, this error is of no consequence because "there is no doubt that the record supports the conclusion that a substantial portion of the zone is in fact industrial". (Res. Br. p. 14) This statement by respondents is impossible in light of the very specific findings of the Trial Court which, with apologies, we repeat here.

The Trial Court found:

> "*casual observer * * * would not consider this to be an industrial zone*," that it was an *industrial zone* "*on paper*" only and not "*in reality*", has never been "*treated*" by the respondents as an industrial zone, and that "*it was a de facto commercial zone*". (Ct.Hr. 8/4/92, T. 29, L. 8-9; T. 30, L. 8-13, Ct. Hr. 2/7/92, T. 55, L. 22-25; T. 56, L. 1-2, Da 177, 178; Ct. Hr. 6/10/94, T. 9, L. 22, 23, T. 11, L. 23, 24, emphasis supplied)

The Trial Court never would have rendered a judgment for the petitioner if, in fact, a substantial portion of the zone was industrial.

CONCLUSION

The Writ Should Be Granted, the Judgment of the Appellate Division Reversed, the Judgment of the Superior Court Reinstated with Interest and with Directions to Update the Legal Fees.

Dated: January 23, 1997

Respectfully submitted,

Ralph J. Schwarz, Jr.
21 East 40th Street, 7th floor
New York NY 10016
(212) 532-0911

Counsel of Record for Petitioner

On the Petition Reply:

Ralph J. Schwarz, Jr., Esq.
Vincent S. Verdiramo, Esq.
Jon P. Campbell, Esq.
Richard S. Brown, Jr., Esq.